

FILED BY CLERK

APR -7 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0367-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
TOMMY ANTHONY CASTILLO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-54207

Honorable Leslie Miller, Judge

REVIEW GRANTED; RELIEF DENIED

Tommy Anthony Castillo

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 After a jury trial, petitioner Tommy Anthony Castillo was convicted of sexual assault and sexual abuse. Castillo appealed the convictions and prison terms imposed, and this court affirmed. *State v. Castillo*, No. 2 CA-CR 97-0029 (memorandum decision filed Mar. 19, 1998). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court denied. He petitioned this court for review of that

decision, and we granted the petition but denied relief. *State v. Castillo*, No. 2 CA-CR 2005-0322 (memorandum decision filed Apr. 21, 2006). In this petition for review, Castillo challenges the trial court's order summarily dismissing his subsequently filed petition for post-conviction relief. Absent a clear abuse of the court's discretion, we will not disturb its ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 On appeal, Castillo contended the evidence had been insufficient to support the sexual assault conviction and that the trial court had erred in failing to strike a potential juror for cause and permitting the victim's mother to remain in the courtroom during the victim's testimony. In the first post-conviction proceeding, which the trial court effectively combined with Castillo's petition for writ of habeas corpus and motion for clarification of his sentence, he challenged the calculation of his release date by the Arizona Department of Corrections (ADOC). In this post-conviction proceeding, he contended appointed counsel in his previous Rule 32 proceeding "never conducted basic Rule 32 investigation, analysis or briefing" and "abandoned" him. He then raised a variety of claims that he characterized as "federal," "structural constitutional claims" that "should be decided on the merits." Finding the petition untimely and the claims raised "could have been raised on appeal or in the prior rule 32 petition," the trial court denied relief summarily.

¶3 On review, Castillo contends the trial court abused its discretion by failing to address his argument that his claims were not subject to the preclusive effect of

Rule 32.2(a)(3) because they amount to “structural” error. He requests that this court “remand” this matter to the trial court and direct it to “analyze the facts, and conduct a legal analysis” that includes an application of this court’s decision in *Swoopes*. He asks us to direct the court “to make findings of fact and law to facilitate appellate review, and explain why structural error does not exist.” A trial court’s determination whether a claim is precluded is a legal question it must address in exercising its discretion to decide if post-conviction relief is warranted; its ruling on that legal question may be reviewed by this court de novo. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶4 Because Castillo has not persuaded us the trial court abused its discretion by summarily denying relief, we deny the relief he has requested on review. The court correctly found that the petition was not only untimely, *see* Ariz. R. Crim. P. 32.4(a), which Castillo does not dispute, but that his claims are, indeed, precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding relief on any claim “waived . . . on appeal, or in any previous collateral proceeding”). Contrary to his assertion, none of Castillo’s claims can be characterized as structural. Moreover, as we discussed in *Swoopes*, 216 Ariz. 390, ¶¶ 23-29, 39, 166 P.3d at 954-55, 957, the question is not whether the error is structural but whether the claims are of sufficient constitutional magnitude that they only can be waived knowingly, voluntarily, and intelligently by the defendant personally. Castillo has not established his claims can be so characterized.

¶5

Although we grant Castillo's petition for review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge